

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KIRK DAHL, et al.,

Plaintiffs,

v.

BAIN CAPITAL PARTNERS, LLC, et al.,

Defendants.

No. 1:07-cv-12388-WGY

**NON-SETTLING DEFENDANTS' MOTION FOR STAGGERED CONSIDERATION OF
THE MOTIONS FOR CLASS CERTIFICATION AND
PRELIMINARY APPROVAL OF SETTLEMENTS**

The non-settling defendants¹ respectfully move this Court to stagger its considerations of plaintiffs' motion for class certification (Doc. No. 927) and plaintiffs' motion for preliminary approval of settlements with defendants Bain Capital Partners, LLC and The Goldman Sachs Group (Doc. No. 984), so that it considers the motion for class certification first.

Plaintiffs ask the Court to certify a settlement class that is nearly identical to one of the litigation classes that is currently the subject of a fully briefed motion for class certification. To support certification of the settlement class, plaintiffs incorporate by reference their motion in support of the certification of the class that would proceed to trial. Defendants oppose certification of any litigation class in this case because, among other things, plaintiffs do not have a reliable method to show the fact of injury by common proof, and therefore cannot satisfy the predominance requirement of Rule 23.

Under the Supreme Court's binding precedent in *Amchem Products, Inc. v. Windsor*, this Court must apply the same predominance standard to the settlement class as to the proposed

¹ The Blackstone Group L.P., Kohlberg Kravis Roberts & Company, L.P., Silver Lake Technology Management, LLC, TC Group III, L.P., TC Group IV, L.P., and TPG Capital, L.P.

litigation classes. 521 U.S. 591, 623 (1997). If the Court preliminarily approves the settlement class on the basis of plaintiffs' evidence in support of their motion to certify a litigation class, and without considering non-settling defendants' opposition to the motion to certify the litigation class, the non-settling defendants' right to oppose the class, and potentially defeat it on the basis of a preponderance of the evidence, may be adversely affected. Staggering the consideration of the two motions and deciding the litigation class motion first will prevent this due process problem as well as conserve the resources of this Court and prevent possible confusion by absent class members.

WHEREFORE, for all of the above-stated reasons, as well as those presented in the Memorandum in Support of Non-Settling Defendants' Motion for Staggered Consideration of the Motions for Class Certification and Preliminary Approval of the Settlements, the non-settling defendants respectfully request that this motion be ALLOWED and that this Court stagger its considerations of plaintiffs' motions for class certification and preliminary approval of settlements with defendants Bain and Goldman Sachs so that it considers the motion for class certification first.

Dated: June 13, 2014

Respectfully Submitted,

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LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(A)(2), I hereby certify that counsel on behalf of the non-settling defendants conferred with counsel for plaintiffs and the settling defendants and attempted in good faith to resolve the matter presented by this motion, but was unable to do so. Settling Defendants Bain and Goldman Sachs take no position on the motion. Non-settling defendants attempted to reach resolution with plaintiffs but were unable to do so in a reasonable time to allow the prompt filing of this motion.

Dated: June 13, 2014

/s/ Jennifer L. Giordano
Jennifer L. Giordano

CERTIFICATE OF SERVICE

I, Jennifer L. Giordano, hereby certify that on June 13, 2014, the foregoing Non-Settling Defendants' Motion for Staggered Consideration of the Motions for Class Certification and Preliminary Approval of Settlements were served upon the attorneys of record for each party by transmission through the Court's electronic case filing system.

/s/ Jennifer L. Giordano
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